

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
SUPPLEMENTAL
BRIEF**

77-1481

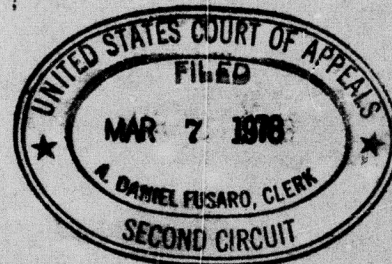
In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1481

UNITED STATES OF AMERICA,
APPELLEE,
-vs-
ANDY CASTRO,
APPELLANT.

On Appeal From The United States District Court
For the District of Connecticut

SUPPLEMENTAL BRIEF OF APPELLANT ANDY CASTRO



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FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

Rule 11(c)(1):

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law.

STATEMENT OF THE ISSUE

Whether the trial judge committed reversible error in failing to advise the appellant of the maximum Special Parole Term, to which he was exposed on his plea of guilty.

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UNITED STATES OF AMERICA,
APPELLEE,

-vs-

ANDY CASTRO,
APPELLANT.

SUPPLEMENTAL BRIEF OF APPELLANT ANDY CASTRO

SUPPLEMENTAL STATEMENT OF FACTS

On September 27, 1977, during the course of the Rule 11 proceedings the trial judge advised appellant Castro in the following manner concerning the maximum sentence under 21 U.S.C. §841(b):

THE COURT: Has anyone promised you
what the sentence might be in this case?

MR. CASTRO: No.

THE COURT: Mr. Pickerstein?

MR. PICKERSTEIN: Sentence five years, fifteen thousand dollars, and a two-year special parole term.

THE COURT: Do you understand that this is the sentence you are exposed to?

MR. CASTRO: Yes.

THE COURT: With respect to the special parole term, has your attorney explained that to you?

MR. CASTRO: Yes.

THE COURT: It means that if a term of imprisonment is imposed, a special parole term will be imposed, a minimum mandatory sentence of two years, as a special parole term. If this is revoked because you violated parole, the original term of imprisonment will be increased by the period of the special parole term. In other words, this is just an example. If you receive a sentence of three years, for example, and a special parole term of two years, and while you are on parole, you violated parole, you would have to serve more time. Do you understand that?

MR. CASTRO: Yes.

(Appendix pp. 40-41.)

SUPPLEMENTAL ARGUMENT

II. THE TRIAL JUDGE'S FAILURE TO ADVISE
APPELLANT CASTRO OF THE MAXIMUM
SPECIAL PAROLE TERM TO WHICH HE MAY
BE SENTENCED VIOLATED THIS COURT'S
RULINGS IN "JOURNET" AND "ALEJANDRO"
AND CONSTITUTES REVERSIBLE ERROR.

Federal Rule of Criminal Procedure 11(c) "expressly obligates the district judge, before accepting a guilty plea, to inform the defendant of the 'maximum possible penalty provided by law.'" United States v. Alejandro, No. 77-1338 (2d Cir., Feb. 9, 1978), slip op. 1517, 1518; see United States v. Journet, 544 F.2d 633, 636 (2d Cir. 1976).^{1/} The non-compliance with Rule 11(c) in this case is exactly the same as that found to be reversible error most recently in Alejandro. In the present case, the district judge advised appellant Castro, inter alia:

THE COURT: It means that if a term of imprisonment is imposed, a special parole term will be imposed, a minimum mandatory sentence of two years

1/ In Alejandro, the majority distinguished United States v. Saft, 558 F.2d 1073 (2d Cir. 1977); and United States v. Michaelson, 552 F.2d 472 (2d Cir. 1977), on the ground that in Saft there was "substantive compliance with the Rule albeit not in precise terms" and that in Michaelson, whose guilty plea was taken during his trial, "his awareness that he was not required to incriminate himself was clearly apparent." United States v. Alejandro, supra, at 1519-1520.

This case is a direct appeal like Journet and Alejandro. Saft and Michaelson were decided under the abuse of discretion and "clearly erroneous" standard applicable to motions to withdraw guilty pleas under Fed. R. Crim. P. 32(d). See Michaelson, supra, 552 F.2d at 475; Saft, supra, 558 F.2d at 1082-83.

as a special parole term

(Appendix p. 41) The district judge failed to advise Andy Castro of "the maximum parole term which could run for the remainder of his life," United States v. Alejandro, supra, at 1518; Journet, supra, 544 F.2d at 636. Judge Zampano advised Castro only of the minimum mandatory term, but not the maximum, which this Court found to be reversible error in Alejandro and Journet.

Moreover, the district judge's failure to comply with the Journet rule is not harmless just because appellant Castro received the minimum special parole term of two years:

[s]ince a guilty plea amounts to a conviction which may have most serious consequences for the accused--in this case [eighteen months'] imprisonment followed by [two years] of [special] parole--the acceptance of the plea cannot be dealt with in a hasty or cavalier fashion. . . . To permit Rule 52(a) to be used as a means of by-passing the specific and detailed procedure prescribed by Rule 11 would be to frustrate and defeat Congress' expressed intention.

Journet, supra, 544 F.2d at 636.

In view of the district judge's failure to advise appellant Castro that the maximum term included the possibility of life-time parole, United States v. Journet, supra, or that the special parole term would run for the remainder of his life, United States v. Alejandro, supra, the plea is a nullity and should be vacated, with the defendant being given the oppor-

tunity to plead again to the indictment before a different judge as requested in the appellant's principal brief.^{2/}

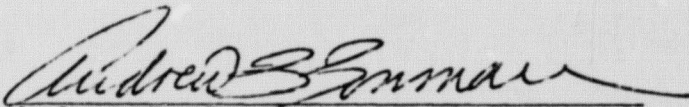
2/ Reassignment to a different judge follows a guilty plea and not a trial; therefore, Judge Zampano would not have the particular insight of a trial judge before whom each and every piece of evidence and circumstance has been presented. Further, there are three other district judges in Connecticut available for sentencing. Finally, since the claim in appellant's principal brief is that the district judge acted arbitrarily and abused his discretion in sentencing, for the judge's sake and the appearance of justice, the matter should be reassigned on remand. See United States v. Robin, 553 F.2d 8 (2d Cir. 1977)(en banc).

CONCLUSION

Appellant Castro's plea should be vacated in view of the district judge's failure to advise appellant, as required by United States v. Journet, of the maximum special parole term to which he may be sentenced, which could run for the remainder of his life. Appellant should be given the opportunity to plead again to the indictment before a different judge as requested in his main brief, which deals with sentence disparity.

Respectfully submitted,

Dated: February 27, 1978


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY That two copies of the foregoing Supplemental Brief of Appellant Andy Castro have been mailed to H. James Pickerstein, Esq., Chief Asst. U.S. Attorney, P.O. Box 1824, New Haven, Connecticut, 06508; and one copy was mailed to Sherry Ginsberg, Esq., Phillips, Nizer, Benjamin, Krim & Ball, 40 West 57th Street, New York, New York, 10019; this 28th of February, 1978.

